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NO. 88-1993

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ROBERT A. BUTTERWORTH,
Attorney General of the State of
Florida, and T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte
County Special Grand Jury,

Petitioners,

v.

MICHAEL SMITH,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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38 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THIS STATE MAY NOT CONSTITUTIONALLY PROHIBIT EVERY PERSON APPEARING BEFORE THE GRAND JURY FROM DISCLOSING MATTERS TESTIFIED TO BEFORE THE GRAND JURY EVEN AFTER THE GRAND JURY INVESTIGATION IS TERMINATED.

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OTHER AUTHORITY

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State's quotation from the statute under review, Section 905.27, Florida Statutes (1987), did not include a pertinent provision relating to witness secrecy. According to Section 905.27(2):

> It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, in any manner whatsoever, any testimony of a witness examined before the Grand Jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding.

The balance of the statutory and constitutional provisions have been accurately quoted.

STATEMENT OF THE CASE

Smith accepts and adopts the statement of the case and facts as set forth in the opinion of the court of appeals below. See Petitioner's appendix at 3-6.[1]

[1] In this response, petitioners Robert A. Butterworth, Jr. and T. Edward Austin, Jr. will be referred to as the "State." The record below is referred to as "R.", petitioner's appendix is referred to as "A." and "Pet." refers to the State's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Far from being a departure from tradition, the Eleventh Circuit's decision applies well-settled principles of First Amendment law to the restraint imposed by Florida's grand jury statute, Section 905.27, Florida Statutes (1987). Michael Smith faces criminal prosecution if he reveals the subject of his compelled testimony before a Florida special grand jury. Statutes that impose criminal penalties for truthful speech are presumed to be unconstitutional. To overcome this presumption, the state must bear the heavy burden of proving that the restraint is supported by a state need of the highest order.

The State cannot carry that burden. Permitting witnesses to speak about their testimony will not interfere with the

grand jury process nor with subsequent grand jury proceedings. In reaching this conclusion, the Eleventh Circuit had the benefit of over forty year's precedent in the federal system. Rule 6(e) of the Federal Rules of Criminal Procedure does not restrict grand jury witnesses from immediately speaking out regarding their testimony. The state had no evidence that the absence of witness secrecy has interfered with the functioning of federal grand jury proceedings. Moreover, two-thirds of the states have no statute compelling grand jury witnesses to remain silent. This long and substantial federal and state experience proves that Florida's rule of blanket secrecy, which forever restrains the speech of grand jury witnesses, cannot be constitutionally justified.

ARGUMENT

THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THIS STATE MAY NOT CONSTITUTIONALLY PROHIBIT EVERY PERSON APPEARING BEFORE THE GRAND JURY FROM DISCLOSING MATTERS TESTIFIED TO BEFORE THE GRAND JURY EVEN AFTER THE GRAND JURY INVESTIGATION TERMINATES.

The State accuses the Eleventh Circuit of casting aside "a tradition steeped in American jurisprudence" by holding that the state cannot constitutionally punish Smith for describing his experience as a witness before a Florida special grand jury. To the contrary, the opinion below is consistent with long-established precedent in this Court holding that only state justifications of the highest order can support criminal penalties for truthful speech. The State cannot meet this heavy burden in light of undisputed evidence that the Federal Grand

Jury system and the grand jury systems of two-thirds of the states function without the need for criminal restraints on grand jury witnesses. Thus, it is the State and not Smith that seeks to uproot long-established traditions and well-settled law.

At the outset, it is important to note the narrowness of the Eleventh Circuit's decision. The only provision of Florida's grand jury statute that was held unconstitutional was the blanket prohibition preventing all grand jury witnesses from disclosing their testimony to anyone even long after the termination of the grand jury's investigation.[2] In all other respects, the grand jury process remains inviolate. The court's limited holding

[2] Section 905.27, Fla. Stat. (1987).

does nothing to open grand jury investigative proceedings or deliberations to public scrutiny. The decision does not limit the right of the State to require secrecy from grand jurors or those court officials connected with the grand jury proceeding. Nor is there any requirement that witnesses disclose their testimony. The witness remains free to choose silence over disclosure. Most importantly, the state circuit court retains the power to impose limited restraints on witness disclosure when sufficiently compelling circumstances are present.

There is nothing unusual or novel in the Eleventh Circuit's approach. The court was guided by the many decisions of this Court condemning prior restraints as unconstitutional and the many decisions reached by other circuit and district courts upholding the value of free speech

even when pitted against statutes requiring grand jury secrecy. In light of the blanket prohibition imposed by Section 905.27 and proof that such a broad restraint on speech is unnecessary to support the State's interests, the Eleventh Circuit reached the only result possible.

Standards Applicable to Prior Restraints

Section 905.27 operates as a penal sanction for publishing lawfully obtained, truthful information. Such a statute can rarely survive judicial scrutiny. According to this Court, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979). Statutes imposing criminal penalties for truthful speech are viewed with the same suspicion and evalu-

ated by the same standards as statutes imposing prior restraints, the most serious and least tolerable restraints on speech. Id. at 101-02. Thus, Section 905.27 comes to this Court with the presumption of unconstitutionality. Minneapolis Star & Tribune Co. v. Minnesota Comr. of Revenue, 460 U.S. 575 (1983); Nebraska Press Asso. v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Carroll v. President & Comrs. of Princess Anne, 393 U.S. 175, 181 (1968).[3]

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[3] It is not necessary to distinguish between the effect of Section 905.27 as a penalty or a prior restraint, because, in either case, the state must prove that the restraint is necessitated by a compelling governmental interest and that there is no less restrictive means to achieve its purpose. See Smith v. Daily Mail, 443 U.S. at 101-02; Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1222 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985).

The State bears a "heavy burden" to justify criminal penalties for truthful speech. See New York Times, 403 U.S. at 714. To meet its heavy burden, the State must demonstrate a need of the highest order. Smith v. Daily Mail, 443 U.S. at 101-02. The substantive evil must be serious and the degree of imminence must be high; that is, the danger feared by the State must not be remote or even probable, it must immediately imperil. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Craig v. Harney, 331 U.S. 367, 376 (1947).

This Court has rejected a wide range of interests as not sufficiently compelling to justify restraints on speech.*

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* See e.g., Minneapolis Star & Tribune Co. v. Minnesota Comr. of Revenue, 460 U.S. 575 (1983) (state's interest in raising revenue); Smith v. Daily Mail Pub.

Indeed, this Court has often been required to weigh the interests of investigative secrecy against the right to speak. For example, in Landmark Communications, this Court strictly scrutinized a statute precluding disclosure of information about activities of the Virginia Judicial Review

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Co., 443 U.S. 97 (1979) (state's interest in preserving the anonymity of its juvenile offenders); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (state's interest in preserving the integrity of its judiciary); Oklahoma Pub. Co. v. District Court of Oklahoma, 430 U.S. 308 (1977) (state's interest in preserving the anonymity of its juvenile offenders); Nebraska Press Asso. v. Stuart, 427 U.S. 539 (1976) (state's interest in protecting a criminal defendant's Sixth Amendment right to a fair trial); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (state's interest in preserving the anonymity of victims of sexual assault and the right of privacy); Craig v. Harney, 331 U.S. 367 (1947) (state's interest in protecting the integrity of the judiciary); Near v. Minnesota, 283 U.S. 697 (1931) (state's interest in preserving the integrity of public office), cited in Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985).

Commission. The Virginia statute prohibited "any person" from divulging information concerning commission proceedings and subjected those who violated the statute to criminal prosecution. The State justified the statute as necessary to protect judges unjustly accused of misconduct from public ridicule.

A newspaper publisher was convicted under the statute for an article accurately reporting on a pending inquiry by the commission. After balancing the state's interest in confidentiality against the publisher's First Amendment rights, this Court held that punishing the newspaper for publishing truthful information violates the First Amendment. The newspaper's conviction was reversed.

Although Landmark Communications is not directly on point, its holding is

instructive because this Court was forced to balance free speech and press rights against the need for secrecy in sensitive proceedings. As such, Landmark provides the framework for analyzing the blanket restraint imposed by Section 905.27. When that framework is applied to this case, it is clear that the Eleventh Circuit correctly ruled that the State has not overcome the presumption that Section 905.27 is unconstitutional.

None of the State's Justifications Support Section 905.27's Blanket Prohibition of Speech

The State first attempts to meet its burden by minimizing Smith's First Amendment interest in this case. The State dismisses Smith's desire to write a news story and a book about his experiences as nothing more than economic speech which

the State argues is "accorded a lesser degree of protection than other types of constitutionally protected expression." Pet. 12. Publishers of books and newspapers in Florida will no doubt be surprised to learn that the State does not consider their endeavors worthy of the full protection of the First Amendment. The State's argument is absurd. Protecting freedom of expression in newspapers and books has always been at the core of First Amendment values and this Court has rejected attempts to characterize publishing activities as a mere business for purposes of First Amendment analysis. See Near v. Minnesota, 283 U.S. 697, 720 (1931) ("characterizing the publication as a business and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint"); Bantam Books, Inc. v. Sullivan, 372 U.S.

58, 70 (1963) (applying the heavy presumption against constitutional validity to a state system of book censorship).[5]

By minimizing the restraint imposed by Section 905.27, the State ignores the harm caused to Smith and others by the statute's blanket and permanent prohibition. Through the threat of criminal penalties, the statute imposes censorship on all grand jury witnesses. Smith cannot discuss the "content or gist" of the questions or his answers for fear that he

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[5] In a similar vein, the State argues that Smith's speech is not worthy of protection because he has not revealed details about his proposed speech. Apparently, the State would have the balancing process be struck based on the content of Smith's speech. Nothing could be more inimical to the values protected by the First Amendment. Smith cannot be required to clear the subject of his speech with the State. Moreover, had Smith described his proposed speech in more detail here, he would have risked violation of the statute.

might be jailed or fined. § 905.27(2). Thus, Smith is threatened with prosecution if he discusses the subject matter of the grand jury's inquiry even if his discussion relates to knowledge gained independently of the grand jury. Explaining the scope of Section 905.27(2) at deposition, the State's own witness agreed that any comments made by Smith touching the subject matter investigated by the grand jury could be interpreted as divulging the "gist" of his testimony (R. 18, pp. 31-32).

The statute thus provides a powerful tool to an unscrupulous state attorney by vesting him or her with absolute "gag" power. The state attorney can forever silence any person on any subject merely by calling that person as a witness to a grand jury proceeding and then threatening the witness with prosecution. That threat

is particularly acute where, as in this case, the witness has knowledge and is prepared to write about a public controversy relating to public officials. A statute that so easily permits the permanent silencing of a witness cannot withstand First Amendment scrutiny.

Smith is harmed as a reporter as well as individually. The statute prevents him from disseminating information of great public importance to others who may be interested in the performance of the public officials under investigation. The State argues that Smith's status as a reporter is irrelevant because reporters are accorded no special status under the First Amendment. Leaving that argument aside, the State overlooks the fact that, by restricting Smith's speech, the statute also restricts the public's right to hear what Smith has to say about the controver-

sy in which he was involved. As one court put it in addressing another restraint on speech arising in the grand jury context: "The order prevents not only [the speaker] from speaking, but the rest of the world from hearing." King v. Jones, 319 F.Supp. 653, 660 (N.D. Ohio 1970), vacated on other grounds, 450 F.2d 478 (6th Cir. 1971), vacated on other grounds, 405 U.S. 911 (1972).

Finally, the State overlooks the stigma that attaches to a witness who testifies before a grand jury. The public often presumes that a witness called before the grand jury has participated in wrongdoing. To the extent this perception exists, Section 905.27 prevents Smith, and others similarly situated, from attempting to ameliorate this stigma because they cannot discuss any aspect of their experience. An individual cannot be deprived of

the right to respond to the compulsive power of government.

To support the restraint in the face of this obvious First Amendment injury, the State resorts to the traditional arguments supporting grand jury secrecy.[6] However, those justifications must be

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[6] The justifications generally recognized by the courts state that secrecy is necessary: (1) to prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jury; (3) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there is no probability of guilt. E.g., United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

examined in light of the narrow ruling of the Eleventh Circuit declaring unconstitutional only that portion of the statute which prohibits witnesses from speaking about their testimony at the conclusion of the grand jury's investigation.

The State argued to the trial court that witness secrecy was necessary to prevent those about to be indicted from fleeing or tampering with evidence, to protect witnesses and grand jurors from retribution, and to prevent the compromise of subsequent grand jury investigations. The concern about fleeing witnesses and witness tampering has been eliminated by the Eleventh Circuit's restriction of its decision to witness disclosure after the conclusion of the investigation (A. 14-15). Thus, the State is left with its concerns about retribution against witnesses and grand jurors and the possi-

ble effect of witness disclosure on future investigations.

There is no evidence that the dangers cited by the State were sufficiently serious and imminent to warrant a blanket and permanent restraint on speech. Conjecture and unsupported assertions cannot overcome the presumption of unconstitutionality. Landmark Communications, 435 U.S. 829, 842-43. Nor is it adequate to say that the Florida Legislature has already balanced these concerns. Id. at 843-44. First, there is no legislative history indicating that the justifications asserted by the State in this case were the basis of the statute's restraint on witness speech. But even if such history existed, the courts have an independent duty to analyze the State's justification. See Id.; Woods v. Georgia, 370 U.S. 375, 386 (1962) ("the ultimate responsibility

to define the limits of state power regarding freedom of speech and expression rests with this Court").

Under the scrutiny required by Landmark Communications, the make-weight nature of the State's arguments is readily apparent. As for the State's fear of retribution against witnesses, there is nothing in the Eleventh Circuit's opinion that requires witnesses to reveal the content of their testimony before the grand jury. If the witness prefers to remain silent, the witness has that right. Nor is there any logic to the state's argument that permitting witnesses to speak will invite retribution against grand jurors. Because proceedings outside the grand jury room are fully accessible to the press, the identity of grand jurors can be ascertained without the need to debrief witnesses.

There is also no support for the State's argument that future investigations will be inhibited by witness disclosure even if the witness is prevented from speaking until the conclusion of the grand jury's investigation. The disruption hypothesized by the State is most unlikely. The witness has access to none of the grand jury's investigative processes nor its deliberations. It is difficult to see how disclosure of the witness' isolated experience in front of a grand jury raises in all cases an imminent threat of disrupting future grand juries. In any event, the State cannot predicate its restraint on what might happen. "The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. at 376.

Even if it were proven that grand jury investigations could occasionally be

threatened with disruption as a result of witness disclosure, this proof would not justify a blanket and permanent prohibition on speech. The Eleventh Circuit's opinion does nothing to eliminate the court's power to impose restraints on a case-by-case basis when it can be proven that the restraint is necessary to combat a serious substantive evil. A blanket prohibition is hardly the type of narrowly-tailored restraint required when First Amendment rights are at stake. See Carroll v. President & Comrs. of Princess Anne, 395 U.S. 175, 183-84 (1968) (a state may not "broadly stifle fundamental personal liberties when the end can be more narrowly achieved").

The State's characterization of the Eleventh Circuit's opinion as a departure from tradition, ignores the fact that the Eleventh Circuit did not address this

issue in the abstract. The court had a long track record of experience against which to compare the State's purported justifications for witness secrecy. The court looked to the present federal grand jury system which enjoys a long history of successful operation despite the fact that witnesses are permitted to speak to anyone at any time regarding the subject of their grand jury testimony. Witnesses have had this freedom since the enactment of the Federal Rules of Criminal Procedure in 1946. See Rule 6(e), Fed. R. Crim. P.

Furthermore, the majority of the states, like the federal court system, allow witnesses to publicly disclose the subject of their grand jury experiences. Only four states expressly prohibit a witness from revealing his testimony

before a grand jury.[7] Another thirteen states, including Florida, include all-inclusive prohibitory language in their grand jury statutes which presumably includes prohibitions against witness disclosure.[8] The other 33 states have no statutory provision compelling witness secrecy.[9]

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[7] Ala. Code §§ 12-16, 211-215 (1984); Mo. Rules Crim. Pro. 540.120; Texas Code of Criminal Procedure, Article 20.15; Wis. Stat. § 756.20 (1982).

[8] Ariz. Rev. Stat. Ann. § 13-2812 (1984); Conn. Stat. § 54-45a (1982); Fla. Stat. § 905.27 (1987); Ind. Code § 35-34-2-10 (1986); Kentucky Criminal Rule 5.24; La. Civ. Code Ann. Article 434 (West 1984); Mich. Comp. Laws Ann. § 28.959(6) (1984); Nev. Rev. Stat. § 172.245 (1982); N.J. Rev. Stat. § 2A:73B-3 (1984); N.C. Gen. Stat. § 15(a)-623(e) (1984); Utah Code Ann. § 77-11-10 (1984); Rule 6(e)(2), West Virginia Rules of Criminal Procedure.

[9] Alaska Crim. R. 6(h); Ark. Stat. Ann. § 43-927 (1984); Cal. Penal Code § 924 (West, 1985); Colo. Rev. Stat. § 16-5-204(g) (1984); Del. Code Ann. tit.

The State had no evidence that the absence of a blanket prohibition on speech had an adverse impact on the functioning

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11, § 1273 (1984); Ga. Code § 15-12-68 (1985); Rule 6(e), Hawaii Rules of Penal Procedure (1977); Idaho Crim. Rules, Rule 6(e) (1986); Ill. Rev. Stat. Chapter 38, § 112-6 (1984); Iowa Code § 813.2, Rule 3 (1986); Kan. Stat. Ann. § 22-3012 (1984); Me. Rev. Stat. Ann. tit. Juries § 1252 (1984); Md. Ann. Code § 8-213 (1984); Mass. Rules Crim. Pro. 5(d) (1984); Minn. Rules of Crim. Pro., Rule 18.08; Miss. Code Ann. § 13-5-61 (1984); Mont. Code Ann. § 46-11-317 (1984); Neb. Rev. Stat. §§ 29-1404-1415 (1984); N.H. Rev. Stat. Ann. § 600:3 (1982); N.M. Rules Crim. Pro. Rule 29.2; N.Y. Penal Law § 215.70 (McKinney 1986); N.D.C.C. Ch. 29 - 10.1; Ohio Rules of Criminal Procedure Rule 6(e); Okla. Stat. tit. 21, §§ 582, 583 (1984); Or. Rev. Stat. § 132.060 (1982); Penn. Rules Crim. Pro. Rules 255-257; R.I. Rules Crim. Pro. Rule 6(e); Ex part McCleod, 252 S.E.2d 126, 128 (S.C. 1979); S.D.C.L. 23-30-14; Tennessee Rules of Criminal Procedure, Rule 6(k)(1); Rule 6(f), Vermont Rules of Criminal Procedure; Va. Code Rule 3A:5(b) (1986); Wis. Stat. § 756.20 (1982); Wyo. Stat. § 7-5-203-204 (1982).

of the grand jury in either the federal system or in any of the 33 states permitting witness testimony. As one court stated:

> There is no evidence that this breach of [witness] secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice.

In re Russo, 53 F.R.D. 564, 570 (D.C. Cal. 1971). In light of the substantial record of successful grand jury operations in the absence of compelled witness secrecy, it is not surprising that the State was unable to satisfy its high burden of overcoming the heavy presumption of unconstitutionality. See Landmark Communications, 435 U.S. at 841 (rejecting the state's attempted prosecution by noting that 40 states have not found it necessary to use criminal sanctions to protect the

secrecy of judicial review commissions); Smith v. Daily Mail, 443 U.S. at 103 (holding unconstitutional a statute making it a crime for a newspaper to publish the name of a juvenile offender by noting that only five states found it necessary to protect the anonymity of a juvenile offender by imposing criminal sanctions).

Although the decision below is the first case squarely addressing the constitutionality of blanket witness secrecy in grand jury proceedings, it is only one of many cases holding that the interest of grand jury secrecy must often bow to the First Amendment. For example, in Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd, 469 U.S. 1200 (1985), this Court affirmed the Seventh Circuit's determination that a newspaper could not be threatened with contempt for printing the

name of the subject of a sealed criminal information. The court held that there was not a sufficiently compelling need for extending the secrecy of grand jury proceedings beyond those court officials who have taken the oath of secrecy. 739 F.2d at 1222-23. See In re Grand Jury Proceedings, 558 F.Supp. 532 (W.D. Va. 1983) (rejecting the government's attempt to seek an injunction to prohibit attorneys from debriefing grand jury witnesses as an unconstitutional prior restraint); In re Grand Jury Summoned October 12, 1970, 321 F.Supp. 238 (N.D. Ohio 1970) (same); In re Russo, 53 F.R.D. 564 (D.C. Cal. 1971) (holding that there was no compelling need to prevent a witness from obtaining a transcript of his or her own grand jury testimony); King v. Jones, 319 F.Supp. 653 (N.D. Ohio), vacated on other grounds, 450 F.2d 478 (6th Cir. 1971),

vacated on other grounds, 405 U.S. 911 (1972) (holding unconstitutional an injunctive order restraining all statements by witnesses who appeared before grand jury).

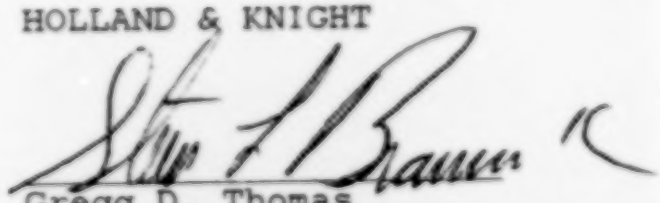
The Eleventh Circuit's opinion did nothing more than apply well-settled First Amendment principles to the restraint at issue in this case. In balancing the interests asserted by the parties, the court had the benefit of a long history of successful experience with federal and state grand jury operations which imposed no restraints on witness secrecy. The court also had the benefit of numerous cases analyzing similar restraints in light of the well-settled First Amendment principles enunciated by this Court. In the absence than anything more than the conjectural and speculative justifications forwarded by the State, the Eleventh

Circuit was correct to declare unconstitutional Section 905.27's blanket and permanent restraint on the speech of grand jury witnesses. In light of the well-settled principles at issue in this case, no purpose would be served by granting the writ.

CONCLUSION

For all the foregoing reasons, the State's petition for writ of certiorari should be denied.

HOLLAND & KNIGHT



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CERTIFICATE OF SERVICE

I, Steven L. Brannock, a member of the bar of this Court, hereby certify that the foregoing Response to Petition for Writ of Certiorari was served upon all parties in accordance with Rules 28.1 and 28.3 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office mail box, with first-class postage prepaid, on this 14th day of June, 1989, addressed to:

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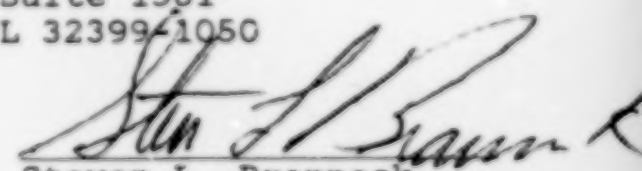

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